UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

IMAGEFIRST UNIFORM RENTAL SERVICE, INC.	:		
Respondent,	:		
and	:	**Case Nos.**	**22-CA-161563**
	:		**22-CA-181197**
LAUNDRY DISTRIBUTION AND FOOD SERVICE JOINT BOARD, WORKERS UNITED, A/W SERVICE EMPLOYEES INTERNATIONAL UNION	:		
Charging Party.	:		

RESPONDENT IMAGE FIRST UNIFORM RENTAL SERVICE, INC.'S REPLY TO GENERAL COUNSEL'S ANSWERING BRIEF TO ITS EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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I. ARGUMENT IN REPLY.

On September 18, 2017, the Counsel for the General Counsel ("CGC") filed an Answering Brief in opposition to Respondent Image First Uniform Rental Service, Inc.'s ("IF" or "Company") Exceptions to Administrative Law Judge Arthur J. Amchan's ("ALJ") April 18, 2017 Decision ("ALJD") in this case. For the reasons set forth in IF's Exceptions, Brief in Support and this Reply Brief, the Board should grant each of IF's Exceptions and dismiss the First Amended Complaint ("FAC") in its entirety.

A. IF Did Not Violate Section 8(a)(1) of the Act by Terminating Supervisor Ventura and Lead Farez. (Exception Nos. 1, 7, 8, 9, and 15).

IF acknowledges that the National Labor Relations Board ("NLRA" or "Board") has not established a bright-line rule that the termination of an unpopular supervisor violates Section 8(a)(1) of the National Labor Relations Act ("Act" or "NLRA"), 29 U.S.C. § 158(a)(1), only if that termination occurs in the critical period. However, IF contends that the reported cases on this issue all addressed terminations in the critical period and that there is more than just serendipity at work. IF also contends that solong it has "a legitimate business reason"[1] to do so, an employer must have the right to make management or supervisory changes where no election petition has been filed or no demand for recognition has been made.

The CGC's focus on the ALJ's statement that "the terminations of Farez and Ventura were not based on any conduct occurring after Respondent became aware of the organizing campaign" proves IF's point. (CGC Relpy Brief at 12 (citing ALJD at 6:27-28)). If the Board adopts the ALJ's position on this issue, then an employer could not lawfully terminate an unpopular supervisor after the onset of union organizing unless that supervisor engaged in

[1] *Sisters Camelot*, 363 NLRB No. 13 (2015) (internal citations omitted). The Company's legitimate business reason for the terminations at issues was the failure of the terminated individual to treat associates with respect, as required by the Company's established values.

"[mis]conduct after [the employer] became aware of the organizing campaign." In other words, an employer that knew a supervisor had failed to conform to performance standards before union activity began could not terminate that supervisor in the absence of any post-activity cause.

In addition to imposing an improper, open-ended restriction on an employer's managerial authority, the ALJ's conclusion on this point should be overruled for another reason. Here, IF President Berstein testified that he was generally aware that associates had issues with how they were treated by Farez and Ventura. [Tr. 681-82]. Berstein also testified without contradiction that he was surprised and concerned by the extent of the associates' feelings of disrespect at the hands of Farez and Ventura and that the situation was much worse than he had understood before his visit. *Id*. Having learned that Farez and Ventura had breached the Company's values to a much greater extent than had been reported to him, Berstein directed that they be terminated. Thus, Berstein, the Company's highest ranking officer, was acting on new information relating to the extent of misconduct. Once he understood the extent of the problem, Berstein took steps to protect the Company's interests, consistent with action taken in similar circumstances. [Tr. 673-75] Because an employer must be free to act in circumstances presented by the case, the Board should grant IF's exceptions on this issue and dismiss the related allegation in the FAC.

B. IF, through Berstein and Kennedy, Did Not Violate Section 8(a)(1) of the Act by Soliciting and Remedying Grievances. (Exception Nos. 2, 6, 10, 14, 16, 17, 18, 19, 20, 21, 22 and 23).

The issue on these exceptions is whether the ALJ correctly determined that IF solicited and remedied associate grievances after the union activity began in a manner that was *materially different* than its pre-organizing practices. As demonstrated in its Brief in Support of Exceptions, IF established that it followed a multifaceted and consistent practice of soliciting associate grievances. [Tr. 556-558, 560, 577-579, 587-588, R-14, R-16] IF also established that it did not

expand or modify this practice in response to union activity. *Id*. Three witnesses testified for IF on these issues, President Berstein, Corporate Director of Human Resources Rivers and General Manager Kennedy; all of them testified that the Company had acted in manner consistent with its established practices. [Tr. 557-560, 577-579, 587, R-14, R-16] As previously noted, the CGC's associate witnesses were completely incredible and should not have been credited by the ALJ on any issue.

Contrary to the CGC's argument at pages 14-17 of his Answering Brief, the testimonial and documentary evidence showed that IF had a consistent practice of soliciting and remedying grievances. [IF brief at 6-7] Regarding Berstein's July 14 meeting with associates, Berstein testified that he conducted this meeting in the same manner that he conducted other associate meeting at Clifton and at other Company locations. [Tr. 670-672] There is no evidence that this meeting was different – let alone *materially different* – than other meetings Berstein had conducted.

Regarding Kennedy's alleged misconduct, the ALJ should not have relied on his comments at his July 20 associate meeting regarding the Farez and Ventura termination in finding a violation of the Act because, as argued above, those actions were not unlawful.

Finally, the CGC champions the ALJ's decision to discredit Berstein's and Kennedy's testimony on this issue because the Company did not call any associates as witnesses to corroborate it and his decision to credit associate witnesses Estelus and Ulloa. [CGC brief at 16-17] The CGC and the ALJ are both wrong here for two reasons. First, by crediting Estelus and Ulloa, the ALJ improperly overlooked that fact the testimony of other 5 associate witnesses – whose testimony should have mirrored that of their 2 colleagues – was literally all over the board

on these issues. [ALJD 10:18-27, n. 7] By randomly crediting Estelus and Ulloa here, the ALJ arbitrarily grasped at factual straws to find a violation of the Act.

Second, the ALJ's reliance on the Company's failure to call any associate witnesses on this issue improperly shifted the burden of proof to IF. As there was no dispute that IF had a practice of soliciting and remedying grievances [ALJD 10:8-15], the CGC had to prove that IF *materially changed* its practice in this regard in response to union activity. Stated otherwise, IF did not have to prove that it had acted consistently. Because the CGC adduced no credible or reliable evidence on this issue, he failed to meet his burden of proof and IF was not obligated to put any evidence on this point.

Finally, the CGC mistakenly relies on *Escondido Ready-Mix Concrete, Inc.*, 189 NLRB 442, 445 (1971) to support the ALJ's credibility determinations here, asserting that the Board in that case agreed with a Trial Examiner's "determination that respondent's failure to call ***employee witnesses*** to testify with respect to allegations was important to resolve contradictory testimony even though ['']General Counsel's witnesses [were] not wholly consistent and in some respects contained contradictions['']. [CGC brief at 17 (emphasis added)] In fact, in that case "Respondent did not call ***any witnesses*** to testify with respect to said allegation." *Escondido Ready-Mix*, 189 NLRB at 445 (emphasis added). Here, IF called three witnesses to testify regarding these issues. For all the forgoing reasons, the Board should grant IF's exceptions on this issue and dismiss the related allegation in the FAC.

C. IF Did Not Violate Section 8(a)(1) of the Act by Providing Food to its Associates. (Exception Nos. 3, 11, 12 and 13).

In addressing this issue, the CGC focuses on several irrelevant and/or de minimis facts related to IF's providing food to its associates. [CGC brief at 19-20]. First, even assuming that IF revived its "Lunch with the Boss" program after the Union activity began, providing a simple,

reasonably proved meal to associates under that banner is not a violation of the Act. Similarly, taking employees out to lunch or giving them menus to order is not illegal even if the Company had not done so in that past, so long as the price and nature of the food provided did not change. In finding a violation on this issue, the ALJ improperly converted de minimis changes into a violation of the Act. The Board should reject the CGC's invitation to follow the ALJ's lead. Because any changed that IF made in the manner in which it provided food to its associates was de minimis, the Board should grant IF's exceptions on this issue and dismiss the related allegation in the FAC.

II. CONCLUSION.

For the foregoing reasons and for those stated in its Brief in Support of Exceptions, Respondent Image FIRST Uniform Rental Services, Inc. respectfully urges the Board to find merit to its Exceptions to the Administrative Law Judge's Decision, and to dismiss the Complaint in its entirety.

Dated: October 2, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 2, 2017, a copy of Respondent's Reply to General Counsel's Answering Brief to Its Exceptions to the Decision of the Administrative Law Judge, was served, via email, upon the following:

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